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In The

Supreme Court of the United States

KLEIN & CO. FUTURES, INC.,

Petitioner,

v.

BOARD OF TRADE OF THE CITY OF NEW YORK, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents are charged by federal law with enforcement of their rules to keep the commodity futures market honest. They failed to do so in bad faith by, *inter alia*, allowing the chairman of respondent New York Futures Exchange, in his role as chairman of the settlement committee for P-Tech futures, to manipulate the settlement price of those futures.

Petitioner, by contrast, followed the rules. Petitioner, as a futures commission merchant, was required by the rules to collect a minimum level of margin from its clients trading in P-Tech futures according to that settlement price set by respondents. Because respondents provided inaccurate information to petitioner about the settlement price of P-Tech futures, petitioner did not demand enough margin from its customers and could not ultimately meet the demand from the clearing organization when the manipulation was revealed and an accurate, and much different, settlement price was set, which put petitioner out of business.

If respondents had enforced their rules, they would not have allowed their settlement committee chairman to manipulate the settlement price and would not have provided petitioner with the inaccurate settlement price. In turn, petitioner would have required adequate margin from its customer and would not have come to be in a position where its customer, First West (which was owned by the individual who was manipulating the settlement price) provided inadequate margin that did not allow petitioner to cover the losses with the clearing organization.

Respondents' failure to enforce their rules was a violation of the Commodity Exchange Act (CEA). Congress spoke directly to such conduct in the CEA, and authorized an express cause of action by any person "who engaged in any transaction on or subject to the rules" of the exchange against entities such as respondents that fail to enforce bylaws or rules. 7 U.S.C. § 25(b)(1) (1994). The court below erroneously held that petitioner lacked statutory standing to bring a claim under Section 25(b)(1), because it read Section

25(b)(1) to allow suits only by a plaintiff who is a buyer or a seller of futures.

The Commodity Futures Trading Commission (CFTC) does not read the statute in that manner. Neither does the leading industry trade association, whose regular membership consists of 35 of the Nation's largest futures brokerage firms, and whose associate membership consists of approximately 150 firms involved in virtually all other segments of the industry (including contract markets and clearing organizations). And the text and structure of the CEA make clear that such a restrictive reading of Section 25(b)(1) is untenable. Congress used language of breadth—"any transaction on or subject to the rules" of a contract market or board of trade (including, pursuant to CFTC regulations, a clearing organization). Congress circumscribed the cause of action elsewhere by requiring a showing of bad faith and limiting relief to actual damages. Congress thereby struck the balance it thought appropriate to promote effective self-regulation and private enforcement of futures markets rules.

Petitioner does not contend, as respondents repeatedly claim (Resp. Br. 18, 28, 44, 45), that *all* activity that is related in any manner whatsoever to the futures market is actionable. But clearing members such as petitioner have always been understood by Congress to be "essential participants" in every transaction entered into on a contract market and on a clearing organization, and "futures trading has a direct financial impact" on them. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 359-360 (1982). There is no reason that Congress would have excluded clearing members from the cause of action for actual damages that were caused by respondents' bad faith violations of law, particularly without saying so.[1]

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[1] Under respondents' view, Congress not only intended to exclude petitioner from Section 25(b)(1), it also intended petitioner to have no recourse in any forum for actual damages caused by respondents' unlawful conduct. Respondents argued below that the CEA preempts petitioner's state law claims regarding respondents' conduct. Resp. C.A.

(Continued on following page)

I. RESPONDENTS' READING OF THE COMMODITY EXCHANGE ACT IS CONTRARY TO ITS TEXT AND PURPOSE AND THE EXPERT VIEWS OF THE FEDERAL AGENCY CHARGED WITH ITS ADMINISTRATION

Respondents have abandoned the Second Circuit's rationale that the cause of action under Section 25(b)(1) incorporates the requirements of the cause of action under Section 25(a). *See* Resp. Br. 20-21 n.11. They are correct to do so because that rationale is contradicted by the statutory text, as our opening brief demonstrates. Nonetheless, respondents attempt to narrow Section 25(b)(1) down to a cause of action that would apply only in the most limited circumstances, making it effectively the same as the limits expressly provided in Section 25(a). But respondents' effort to reach the same result through different means is similarly without support in the text, structure or history of the statute.

A. The Phrase "Any Transaction" Does Not Reflect A Congressional Intent To Limit The Section 25(b)(1) Cause Of Action To "Buyers And Sellers" Or "Traders," As Respondents Urge

1. Wherever Congress intended to limit a provision of the CEA to "buyers and sellers" or to "traders," it did so through express use of those terms. Congress used none of these terms in Section 25(b)(1) and respondents are wrong to attempt (Resp. Br. 22-25) to so confine that provision.

For example, in Section 25(a)(1)(D), Congress limited a cause of action explicitly to persons who "purchased or sold"

Br. 41-48. The court of appeals did not reach this issue, instead affirming the district court's discretionary dismissal of the state law claims after it had dismissed the federal claim. Pet. App. 13a-15a. Petitioner filed a state court action in March 2007 raising one state law defamation claim against respondent NYBOT. In May 2007, NYBOT moved to dismiss that claim arguing, *inter alia*, that it was preempted by the CEA. The state trial court has not yet ruled on that motion.

contracts. If Section 25(b)(1) were intended to impose the same limitation as Section 25(a)(1)(D), Congress would have used the term "purchased or sold" contracts in Section 25(b)(1) rather than the broader term "engaged in any transaction."

Respondents contend that the express textual limitation of Section 25(a)(1)(D) nonetheless applies to Section 25(b)(1) because, in their view, Congress used "purchased or sold" as a type of shorthand because it would somehow have been "awkward" to use in Section 25(a)(1)(D) the phrase "transaction on or subject to the rules of a contract market" as it used in Section 25(b)(1). Resp. Br. 29. That contention gives no weight to the settled cannon of construction that different words in the same statutory section must be given different meanings. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended"). It also suggests that Congress valued non-awkwardness over consistency, but it is clear from the text of the CEA that Congress tolerated many awkward phrasings to use terms consistently.

Respondents also point to a number of places in the statute where Congress used the word "trade" near the word "subject to the rules," Resp. Br. 24-25, and they suggest that the term "transaction" when used near the word "subject to the rules" should be given the same meaning. But Congress's use of the term "trade" or "contract" (which respondents' claim is synonymous with trade) in several provisions of the CEA, *see*, *e.g.*, 7 U.S.C. §§ 6i, 7a(a)(7), 7a(a)(12)(A), 12b (1994), only highlights that it chose to use a different term in Section 25(b)(1), *i.e.*, "transaction," that has a much broader scope. Contrary to respondents' claim (Resp. Br. 29), examination of the entire statute is the appropriate process in which to determine the meaning of a term used throughout the statute, not just certain pre-selected provisions.

The provision of the statute that defines the CFTC's exclusive regulatory jurisdiction over certain matters

provides a particularly useful example of the fact that Congress did not view these terms to be interchangeable. Section 2(i) granted the CFTC exclusive jurisdiction over certain "transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market." 7 U.S.C. § 2(i) (1994). In order to limit the scope of the broad term "transactions" in this provision, Congress added requirements that the transaction involve futures sales contracts that are "traded or executed" on the contract market, which demonstrates that the use of the term "transactions" in Section 25(b)(1) without the modifying phrase is not limited to trades. Respondents cite (Resp. Br. 25) *FTC v. Ken Roberts Co.*, 276 F.3d 583 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 820 (2002), but that case does not support their artificially narrow reading of the term. The D.C. Circuit held that the term "transactions" as used in Section 2(i) (codified as amended in 2000 at 7 U.S.C. § 2(a)(1)(A)) is "most naturally read as encompassing * * * a set of arrangements directly related to the actual sale of commodities futures," including "categories of financial arrangements through which the trading of commodities occurs *or is facilitated*." *Id.* at 590 (emphasis added). Thus, that ruling confirms that the term "transactions" as used in Section 25(b)(1) without any such modification has an even broader scope, including clearing functions.

If Congress had intended to limit the scope of Section 25(b)(1) so that it applied not to all transactions that are on or subject to the rules of a contract market, but only to some subset of such transactions, Congress would have done so as it did in other portions of the CEA. *See* 7 U.S.C. § 7a(a)(15)(D) (1994) (describing the consequences when "a contract market takes final disciplinary action against a member for a violation that involves the execution of a *customer transaction*") (emphasis added). Instead, Congress used the phrase "any" transaction and "any" is a modifier that conveys "an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Congress was clear, and respondents' efforts to create uncertainty are unavailing.

2. Respondents broadly declare that "every court" to address the issue has ruled that Section 25(b)(1) is available only to traders of futures contracts. Resp. Br. 2, 28. Respondents' citations include only one appellate case—*American Agricultural Movement, Inc. v. Board of Trade of Chicago*, 977 F.2d 1147 (7th Cir. 1992)—and the plaintiffs in that case did not claim to have standing under any subsection of Section 25(b) but, instead, were seeking to recover under an implied private right of action. The plaintiffs were farmers not involved in the commodity futures trading market in any way, but who wanted to sell in the cash market.

Respondents' other citations are to four trial court rulings. Any language in those cases about who can bring suit under Section 25(b)(1) must be read in the context of the distinct circumstances of each case, none of which involved claims brought by a clearing member such as petitioner. One case addressed only a claim under Section 25(a). *See Unity House, Inc. v. First Commercial Fin. Group*, 1997 WL 701345, No. 96C-1716 (N.D. Ill. Nov. 5, 1997), *aff'd*, 175 F.3d 1022 (7th Cir. 1999). Two cases were resolved based on a failure to sufficiently plead bad faith (an issue respondents pressed below but that has never been addressed by any court). *See DGM Invs., Inc. v. New York Futures Exch., Inc.*, 2002 WL 31356362, No. 01 Civ. 11602 (S.D.N.Y. Oct. 17, 2002); *Vitanza v. Board of Trade of the City of New York, Inc.*, 2002 WL 424699, No. 00 CV 7393 (S.D.N.Y. Mar. 18, 2002). The fourth case was brought by a person who had traded on foreign futures markets and was seeking to hold domestic markets responsible for the effects an alleged conspiracy had on the foreign markets. *See de Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985). In none of those cases did the district court have before it the views of the CFTC, which is before this Court urging reversal. Thus, none of those cases compel narrowing the Section 25(b)(1) cause of action to exclude clearing members.

B. Respondents' Effort To Narrow Section 25(b)(1) Is Contrary To The CFTC's Longstanding View And Congressional Intent That Clearing Transactions Be Subject To The CEA

Respondents appear to acknowledge that petitioner *did* engage in transactions on or subject to the rules of a clearing organization because they state that the clearing process "creates two new agreements" to which an FCM like petitioner is indisputably a party. Resp. Br. 7. To attempt to avoid the reach of Section 25(b)(1), however, they argue that its reference to "any transaction on or subject to the rules of such contract market" does not include the rules of a clearing organization. Resp. Br. 25-27. But at the time that Congress enacted Section 25(b)(1) in 1982, it was well established in a 1976 CFTC regulation that "rules of a contract market" included rules of a clearing organization. *See* Pet. Br. 15 n.7. Although respondents are correct that the CFTC regulation, of course, addressed a different statutory provision because Section 25 had not yet been enacted, the CFTC was interpreting the same statutory phrase "rules of a contract market."

Respondents offer no support for the view that Congress would, in enacting Section 25(b)(1), intend the phrase "rules of such contract market" to mean something other than the meaning already attributed to that statutory phrase through notice-and-comment regulations. *See CFTC v. Schor*, 478 U.S. 833, 845-846 (1986). The United States does not view the CFTC's regulatory interpretation as limited to a single provision (*see* U.S. *Amicus* Br. 26), and the agency's understanding of its own regulation is entitled to the strongest form of deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).[2]

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[2] Respondents claim (Resp. Br. 21 n.12) that the CFTC's views on the scope of the cause of action are entitled to no deference, citing *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990). But *Adams Fruit*, in holding that a federal agency's interpretation of a statute did not compel a court to hold that a federal remedy was preempted by state law, did not suggest that a federal agency's views would be disregarded in fitting

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Indeed, the CFTC confirmed in *Interpretive Letter No. 82-5*, Comm. Fut. L. Rep. ¶ 21,964 (Div. of Trading & Mkts., June 15, 1982), cited by respondents (Resp. Br. 27 n.16), that the rules of a contract market and its clearing organization cannot be treated as separate and that, in fact, a contract market has an "obligation * * * to enforce the approved rules of its clearing organization" against "participants in the system" even if "the clearing organization is separately incorporated." Thus, whether the petitioner's actions are viewed as a number of distinct but related transactions on the contract market and clearing organization or as subsidiary components of a single transaction, *see* U.S. *Amicus* Br. 24-25 n.13, it is clear that petitioner engaged in transactions subject to the rules of a contract market.

Contrary to respondents' assertion (Resp. Br. 26-27 n.16), this settled understanding that the reference to the "rules of such contract market" in Section 25(b)(1) includes rules of the contract market's clearing organization does not make redundant the reference to clearing organizations elsewhere in Section 25(b)(1) or generally. A clearing organization is subsumed in a contract market only for purposes of its *rules*, not for all purposes. *See also* CFTC, *Contract Market Rules & Authority Delegation*, 41 Fed. Reg. 40,091, 40,093 n.8 (Sept. 17, 1976) (CFTC rejecting similar argument in promulgating regulation).

Respondents appear to concede that the statute currently in effect (after the 2000 amendments) would permit petitioner to bring the instant action against respondents because, after the amendments, Section 25(b)(1) explicitly cites the rules of a "registered entity," which is a term that plainly encompasses both contract markets and clearing organizations. Resp. Br. 26 & n.15; *see also* U.S. *Amicus* Br. 25 n.14 (reading respondents' brief in opposition

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together parts of a highly technical statute. This Court has often given *Chevron* deference to agency interpretation of the elements of a federal cause of action. *See, e.g., Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) (giving *Chevron* deference to EEOC regulation defining meaning of affirmative defense in private cause of action).

not to dispute that proposition). But there is absolutely no support whatsoever for the proposition that Congress intended its 2000 amendments to substantively alter the scope of the cause of action; it intended the amendments to make only a clarification. Pet. Br. 15 n.7; U.S. *Amicus* Br. 3 n.1.

C. The Remedy Under Section 25(b)(1) For Recovery Of "Actual Losses" Does Not Restrict The Cause Of Action To Buyers And Sellers

Respondents contend (Resp. Br. 27) that the remedy authorized under Section 25(b)(1) limits who can bring the cause of action. They argue that the use of the term "actual losses" in Section 25(b)(1) must mean "trading losses."

First, it is far from clear that the term "actual losses" was intended to have a narrower meaning than "actual damages," which is also used in Section 25(b)(1). In other provisions of the CEA, the term "losses" appears to be treated as broader than "damages."[3]

Second, even if "actual losses" are different from "actual damages," there is no justification for reading the statute to limit "losses" to *trading* losses. And, as we discuss on pages

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[3] Sections 7a and 21 require contract markets and registered futures associations to have arbitration procedures for the resolution of customers' claims against their members. *See* 7 U.S.C. §§ 7a(a)(11), 21(b)(10) (1994). In certain cases, the procedures must allow for the "payment of *actual damages* proximately caused by such violation." *Id.* §§ 7a(a)(11)(i), 21(b)(10)(i) (emphasis added). Where such a violation is willful and intentional, those provisions further require procedures that allow for punitive damages "in addition to *losses* proximately caused by the violation, in an amount equal to no more than two times the amount of such *losses*." *Id.* §§ 7a(a)(11)(ii), 21(b)(10)(ii) (emphasis added). It would appear that the term "losses" in those provisions was intended to be equal or broader, but certainly not narrower, than the term "damages," because a person who engaged in a willful and intentional violation would be required to pay "losses proximately caused" (plus capped punitives), while a less culpable person would be required to pay "actual damages proximately caused." There is no reason to think Congress intended to provide a lesser measure of compensatory relief for victims of willful and intentional violations than other victims.

18-19, *infra*, it is clear that petitioner sustained actual losses in this case.

D. The Legislative History Provides No Evidence Of A Congressional Intent To Exclude Clearing Transactions And Section 25(b)(1)'s Authorization Of Suit By Clearing FCMs Does Not Lead To Absurd Results

1. Respondents contend (Resp. Br. 38-40) that the legislative history of Section 25(b)(1) demonstrates that Congress intended to create a cause of action for investors. But nothing in respondents' extensive canvassing of the legislative history reveals any intent by Congress to create an action *only* for investors.

This Court has made clear that the legislative history of a statute need not discuss a particular scenario in order for the statute to apply in such a situation. Congress may have a particular paradigmatic case in mind when it approaches certain legislation, but it then often enacts a broader remedial principle. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted).

Moreover, the only relevant case law prior to the enactment of Section 25 *permitted* a clearing FCM to sue an exchange under the CEA's implied private right of action, as respondents reluctantly concede. *See* Resp. Br. 37 (discussing *Seligson v. New York Produce Exch.*, 378 F. Supp. 1076 (S.D.N.Y 1974)). Respondents point to no legislative history stating that Congress intended to adopt a different approach (despite the *Seligson* case being cited by this Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982)), nor to any case law prohibiting such an action prior to the enactment of Section 25.

2. Respondents argue (Resp. Br. 43-44) that the interpretation of petitioner and of the United States would somehow affect other unrelated provisions of the CEA, but

respondents do not take into account the context or exact terminology of those other provisions.

Contrary to respondents' claim (Resp. Br. 43), the interpretation of petitioner and of the United States would not extinguish an investor's cause of action under Section 25(b)(1). *See* U.S. *Amicus* Br. 29. Indeed, it is only respondents' creation of heightened proximate causation requirement, which is found nowhere in the text of the statute, that would yield such a result. We demonstrate below, pages 15-17, that there is no such requirement.

Respondents then attempt to have it both ways and claim (Resp. Br. 44) that any investor cause of action that does survive would produce impermissible, duplicative recoveries. But the fact that a contract market or clearing organization's bad faith misconduct may have directly injured several persons does not mean that providing redress to each person for that person's "actual losses" is in any way duplicative.

Respondents' view of the structure of Section 25(b)(1) (Resp. Br. 44-45) to require the narrowing of the cause of action to lessen the threat of liability for potential defendants ignores the various express limits in the statutory text that Congress placed on the cause of action that make it rather unattractive in comparison to other express federal causes of action or state common law torts. A plaintiff must show that the defendant acted in bad faith in its enforcement or failure to enforce the rules in order to establish liability. *See* 7 U.S.C. § 25(b)(4) (1994). Further, no punitive or treble damages are permitted under Section 25(b)(1), just "actual damages." Also, the CEA does not authorize an award of attorneys' fees for a prevailing party. And CEA claims may be heard only in federal court, thus providing an extra layer of protection to ensure that litigation does not stray beyond the intent of Congress. *Id.* § 25(c).

II. PETITIONER IS ENTITLED TO SUE EVEN UNDER RESPONDENTS' CRAMPED LIMITATION OF SECTION 25(b)(1) TO BUYERS AND SELLERS

Even if respondents were correct to limit Section 25(b)(1) to buyers and sellers of futures on a contract market (and not

a clearinghouse), petitioner would satisfy their standing requirement because an FCM such as petitioner, which is a clearing member, is necessarily a buyer or seller of every futures contract.

As respondents acknowledge, a clearing member "assume[s]" the contract to buy or sell commodity futures under the rules of the contract market, here NYFE. Resp. Br. 6. Petitioner thus "engaged" in such transactions within the meaning of Section 25(b)(1). Although respondents describe this as a "quite transitory" or "extremely brief" status, Resp. Br. 10, 41, it is, even under respondents' view, petitioner's status for some period of time and places it within the class of those who are eligible to sue under Section 25(b)(1).

In fact, the NYFE rules confirm that a futures contract is always made "on behalf of a clearing member who shall be the buyer or seller of said contract" and who subsequently "assume[s] said contract" in writing. Pet. Br. 14a (NYFE Rule 306(i)(2) (2000)). Respondents seek to deflect the impact of this rule by first contending (Resp. Br. 41) that an exchange rule cannot affect the scope of the federal statute. But the rule simply reflects the reality of the futures market.

Respondents are wrong (Resp. Br. 6 n.4, 41 n.22) to contend that the markets have adopted varied approaches, suggesting that clearing members may be able to sue the other contract markets, but not respondent NYFE. The United States explains that NYFE Rule 306(i)(2) "is in keeping with general custom in the industry" that "[t]he initial buy-sell agreement that is formed on the floor of the exchange (*i.e.*, before the clearinghouse's assumption of obligations as part of the clearing process) is a trade between FCMs." U.S. *Amicus* Br. 21. The federal government's understanding of the industry should be respected because the CFTC exercises extensive oversight of the contract markets and their rules. (Indeed, prior to 2000, the CFTC was required to approve the rules of a contract market and its clearinghouse. *See* 7 U.S.C. § 7a(a)(12) (1994)). The government's view is confirmed by the consistent judicial discussion of the role of clearing members in different contract markets. *See* Pet. Br. 38 n.15 (citing, *inter alia*, *Leist*

v. Simplot, 638 F.2d 283 (2d Cir. 1980) (discussing New York Mercantile Exchange), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), and *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984) (discussing Chicago Mercantile Exchange and relying on *Leist*)).

Respondents also attempt to deconstruct the text of NYFE Rule 306(i)(2) (Resp. Br. 41-42) by suggesting that the rule's provision that the contract is made "on behalf of a clearing member," refers to an agency relationship between a clearing member and its customer. But the rule describes the events from the position of a broker who executes a trade, and the rule makes clear that the broker makes the contract "on behalf of a clearing member." Pet. Br. 14a. That rule has nothing to do with the relationship between a clearing member and its customer.

III. PETITIONER SUSTAINED ACTUAL LOSSES THAT RESULTED FROM THE TRANSACTIONS IN WHICH IT ENGAGED AND THAT WERE CAUSED BY RESPONDENTS' FAILURES TO ENFORCE THEIR RULES, BUT THOSE ISSUES ARE NOT PROPERLY BEFORE THE COURT

In the final pages of their brief, respondents give a nod to the weakness of their standing argument by raising a new claim that the complaint does not adequately allege causation or actual losses. Those issues are not properly before this Court. Moreover, respondents are wrong on the law and on the facts. The complaint plainly alleges that petitioner sustained actual losses that were caused by respondents' failure to enforce their rules regarding the transactions in which petitioner engaged.

A. Respondents Did Not Preserve A Proximate Cause Argument

Respondents assert that "[t]he proximate cause issue" has been "raised repeatedly at every stage of the litigation." Resp. Br. 48 n.24. That is incorrect. Rather, respondents

consistently have argued that Section 25(b)(1) "creates a bright line test for standing—if the plaintiff was not a trader, then the plaintiff does not have standing." Resp. C.A. Br. 23. That standing argument was erroneously accepted by the district court and the court of appeals and respondent defended it in its brief in opposition. *See*. Br. in Opp. 6 ("the court of appeals correctly held that Petitioner lacked standing to bring CEA claims against the NYBOT respondents under Section [25](b) because Petitioner was not itself a trader").[4]

Respondents now raise a question regarding the showing that must be made to establish that respondents are liable because their bad faith misconduct caused petitioner's actual damages. Causation goes to the merits of whether petitioner has stated a claim for relief; it does not go to the separate standing question of whether petitioner falls within the class of people intended to be able to sue under the statutory cause of action, assuming they can show respondents' violation of law caused them damages. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998)

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[4] Proximate cause was neither pressed before the court of appeals nor passed on by that court, where respondents urged affirmance of the district court's holding that petitioner "lacked standing" under Section 25(b)(1) because it was not a trader, Resp. C.A. Br. 17-34, and urged three alternative grounds for affirmance (unavailability of declaratory relief, failure to adequately allege bad faith, and failure to allege fraud with particularity), *id.* at 35-40. Respondents did not raise causation or cite the cases that they now claim are relevant. The court of appeals accepted respondents' standing argument. Pet. App. 11a (holding that "the clear text of the statute" provides that "Section [25](b)'s remedies are expressly available only to a private litigant who 'engaged in any transaction on or subject to the rules' of contract markets or other registered entities" and that petitioner did not engage in such transactions because it "was not an owner of P-Tech contracts traded by First West"). The language quoted by respondents (Resp. Br. 47) about profits and losses involved an alternative argument advanced by petitioner that petitioner had standing by analogy to the "forced" seller doctrine under the Rule 10b-5 implied private right of action. The court of appeals held that argument irrelevant to the express statutory cause of action under the CEA, and alternatively held that petitioner would not have qualified as a forced seller or purchaser because it had "no interest in any of the resulting profits or investment losses." Pet. App. 12a.

(distinguishing "statutory standing," which addresses "whether [a statute] authorizes this plaintiff to sue" from "the scope of the [statutory] right of action," which "goes to the merits").

The structure of Section 25(b)(1) makes this clear. It identifies the person who can sue—"a person who engaged in any transaction on or subject to the rules of the contract market or licensed board of trade." It identifies the *actus reus* required to establish a violation—failure by a contract market, clearing organization, or licensed board of trade to enforce, or illegal enforcement of, any rule. And then it identifies the relief—"actual damages" "to the extent of such person's actual losses that resulted from such transaction and were caused by" the defendant's failure to enforce the rules. (The *mens rea* requirement—bad faith—is supplied in Section 25(b)(4)).

In any event, even if respondents had raised their strict proximate causation argument below, the failure of the court of appeals to address the issue (particularly free from its erroneous restriction of standing to buyers and sellers) and respondents' limited discussion of the issue in this Court, weigh heavily against this Court addressing the proximate cause issue. *See Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1999 (2006) ("We decline to consider [whether respondent alleged proximate cause for its] § 1962(a) claim without the benefit of the Court of Appeals' analysis, particularly given that the parties have devoted nearly all their attention in this Court to the [proximate cause for its] § 1962(c) claim.").

B. Respondents' "Strict Proximate Cause" Argument For Section 25(b)(1), Derived From RICO And Antitrust Law, Is Insupportable

1. The Racketeer Influenced and Corrupt Organizations Act (RICO) and antitrust cases cited by respondents (Resp. Br. 48-50) to attempt to create a heightened causation requirement for Section 25(b)(1) are inapposite.

First, RICO and the antitrust laws allow the recovery of treble damages and attorneys' fees in every case in which a

plaintiff prevails. *See* 18 U.S.C. § 1964(c); 15 U.S.C. § 15(a). The "potency of the remedy," *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982), has led the Court to develop and apply specialized proximate causation requirements in such circumstances. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 & n.6 (1986) (holding that "the difference in the remedy each section" of the antitrust laws authorizes "affect[s] the nature of the injury cognizable under each section"); *see also Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 411-412 (2003) (Ginsburg, J. concurring) (noting that the Court is "rightly reluctant * * * to extend RICO's domain further" given the "hefty civil liability on those engaged in conduct within the Act's compass"). The remedy available under Section 25(b)(1) is much less potent, limited to actual damages, and thus there is no need for the causal connection to be as strict.

Furthermore, Section 25(b)(1) differs significantly from RICO and the antitrust laws in terms of its subject matter. RICO and the antitrust laws are prohibitory in character and apply to the entire economy. Section 25(b)(1), however, is intended to enforce an affirmative government mandate that highly-regulated entities in the commodity futures market do something (*e.g.*, properly enforce their rules) to protect private parties from wrongdoing by third parties, which also protects the integrity of the commodity futures markets in the nation's economy. Thus, Congress would not have intended that the strict showing of causation in the RICO or antitrust context be required to determine whether a violation of the CEA by a contract market or clearing organization's failure to enforce its rules resulted in a plaintiff's losses.

Nor is there any reason to think Congress intended decisions based on RICO and antitrust laws to be incorporated into Section 25(b)(1). Respondents' assertion (Resp. Br. 48) that Section 25(b)(1) uses "language similar" to those statutes is wrong. Those statutes permit treble damages and attorneys' fees to a person "injured in his business or property by reason of" a violation of particular laws. 18 U.S.C. § 1964(c); 15 U.S.C. § 15(a). Neither statute

uses the language of causation that Congress specified in Section 25(b)(1).[5]

2. Respondents' new strict proximate cause argument also once again seeks to incorporate into Section 25(b)(1) statutory limitations that appear only in *other* sections of the CEA. Congress expressly imposed a "proximately cause[d]" standard for private parties to recover actual damages under four provisions of the CEA. *See* 7 U.S.C. §§ 25(a)(3)(A), 18(a)(1)(A), 7a(a)(11)(i), 21(b)(10)(i) (1994).

Imposition of that causation standard in those provisions is explained by the fact that each *also* authorizes recovery of punitive damages up to two times the amount of actual damages upon a showing of a "willful and intentional" violation. Congress thus appears to have determined that the opportunity for an injured party to recover damages exceeding actual damages required a proximate cause requirement. But Section 25(b)(1) does not allow for punitive damages or any type of multiplier. Congress did not include the "proximately caused" language in Section 25(b)(1) and that difference must be given meaning. Pet. Br. 29-30.

C. Petitioner's Complaint Alleges Actual Losses

Finally, respondents' new argument regarding actual losses cannot sustain the judgment below.

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[5] *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), supports a finding of causation here, contrary to respondents' claim. Resp. Br. 48-49. *Holmes* was a private treble damages action decided under RICO and the Court held, on summary judgment, that a conspiracy to manipulate securities prices that bankrupted "broker dealers" did not proximately cause the damages of their *customers* who did not purchase the manipulated securities. The Court so held because it viewed the "broker-dealers" who had been bankrupted due to the manipulation as the "directly injured" parties who could (and had) sued the conspirators. *Holmes*, 503 U.S. at 273. In a parallel manner, because it is petitioner who was put out of business due to respondents' failure to enforce their rules to prevent manipulation, it is petitioner who is a "directly injured" party who can sue respondents.

For the reasons set forth above, the actual losses requirement (like causation) goes to the scope of relief recoverable, not to statutory standing, and thus is not appropriately raised at this time. Respondents are wrong, in any event, that petitioner did not sustain actual losses under Section 25(b)(1).

First, they assert (Resp. Br. 50) that petitioner's allegations regarding the $4.5 million margin deficit (in response to which respondents seized funds that petitioner had held for its customers) cannot establish petitioner's actual losses because respondent NYBOT paid that money back to petitioner's customers. But their only support for this assertion are the allegations of a complaint that they filed against petitioner (which was consolidated in the district court with the instant case). Resp. Br. 50 (citing Resp. Br. 15, citing Pet. App. 28a-29a & n.13, which repeats the allegations made by respondents in their complaint against petitioner). An exhibit filed by respondents in that case makes clear, however, that petitioner paid $1.34 million of its *own* money to its customers to replace in part money that respondents had seized from the funds petitioner had held on behalf of its customers.[6] Thus, although petitioner's complaint is not so specific on this point as it might be, it is clear that petitioner sought relief due to payments it made in response to respondents' seizure of its customers' funds. *See* J.A. 26 (Comp. ¶ 110) (respondents seized $8 million in funds petitioner was holding for its customers); 48-49 (Comp.

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[6] That exhibit is a settlement agreement between petitioner, respondents, the New York Mercantile Exchange (NYMEX), and 15 of petitioner's customers that explains that petitioner "voluntarily deposited with NYMEX approximately $1.34 million in funds which NYMEX is now holding as custodian for Klein * * * on behalf of Klein's customers," and that petitioner "authorize[d] NYMEX to distribute the funds held in the Custodian Account to the Individual Plaintiffs" as part of the settlement. *Board of Trade of the City of New York v. Klein & Co. Futures, Inc.*, No. 01-cv-04071, Dkt. No. 14, Exh. D, at 2, 4 (S.D.N.Y Aug. 30, 2002). This money paid by petitioner was in addition to the $4.5 million that respondents paid petitioner's customers and which respondents are currently seeking to recover from petitioner. Resp. Br. 50.

¶¶ 207-210) (respondents' seizure of petitioner's customer's money injured petitioner).

Second, the complaint alleges that petitioner was required by NYCC rules to deposit into a NYCC "guaranty fund" no less than $300,000 and as much as $3.5 million. J.A. 20-21, 72-73 (Comp. ¶¶ 74-76; NYCC Rule 5.4(a)(iii) (2000)). That money has not been returned to petitioner and that constitutes an actual loss.

Third, the complaint alleges that petitioner was forced to close its business because, after respondents seized its money, it no longer had sufficient capital to retain its membership privileges on the contract market and clearing organization. J.A. 39 (Comp. ¶ 156). That plainly resulted in actual losses by petitioner. Harkening back to its proximate cause argument, respondents contend (Resp. Br. 49-50) that such losses are too indirect. But because a plaintiff must show a defendant's bad faith to recover damages under Section 25(b)(1), the scope of actual losses that are compensable should not be arbitrarily limited and instead should be viewed commensurate with the state of mind required to prevail. *Cf. Restatement (Second) of Torts* § 435B cmt. a ("responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault").

Thus, petitioner's allegations have plainly given respondents notice of its "actual losses" under "the liberal pleading standards" set forth by Federal Rule of Civil Procedure 8(a), *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007), as necessary to resist a motion to dismiss for failure to state a claim under Rule 12(b)(6). As the Court explained: "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Ibid.* (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)).

Further, petitioner's actual losses were the result of respondents' multiple failures to enforce their rules. The complaint makes clear allegations that, *inter alia*, petitioner relied on the manipulated settlement prices issued by

respondents in setting margin levels, and that respondents waived regulatory requirements for the purpose of inducing petitioner to continue its contractual commitments to the clearing organization. J.A. 18, 20-21, 30, 38-39 (Comp. ¶¶ 61, 74-79, 121, 153-156). *See also, e.g.*, *Blue Shield*, 457 U.S. at 479-480 (permitting patient to recover under antitrust laws when the injury to her "was clearly foreseeable" even though the target of the antitrust violation by a health insurance company was the doctors and the patient would not have been injured if her employer had not purchased a particular insurance plan for her). Of course, loss and causation are both fact-based case-specific inquiries, another reason that they should not be resolved by this Court in the first instance.[7]

CONCLUSION

For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[7] If the complaint were found to not state a claim upon which relief could be granted due to the causation or loss issues, petitioner should be entitled to amend the complaint to address any purported omissions or uncertainties. *See* Fed. R. Civ. P. 15(a) (plaintiff may file amended complaint as of right so long as, as in this case, no answer has been filed; and otherwise with leave of court, which "shall be freely given when justice so requires"). Although petitioner did not previously seek leave to file such an amended complaint, respondents' arguments in the district court gave petitioner no notice that the allegations of the complaint regarding causation and loss were relevant to the statutory standing issue on which respondents sought to dismiss the complaint. Indeed, because the district court did not address those grounds, seeking leave after the district court dismissed the case to file an amended complaint to supplement or clarify those allegations would have been pointless. *See Van Buskirk v. The New York Times Co.*, 325 F.3d 87 (2d Cir. 2003) (district court need not permit amendment of complaint after dismissal under Rule 12(b)(6) if even a liberal reading of the complaint gives it no indication that the opportunity to amend might allow the statement of a valid claim).

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